STATE OF MICHIGAN

COURT OF APPEALS

GERALD THOM and AILEEN THOM,

Plaintiffs-Appellants,

and

LOCKWOOD HILLS ASSOCIATION,

Intervening Plaintiff,

v

SIMON PALUSHAJ and SACA PALUSHAJ,

Defendants-Appellees.

UNPUBLISHED
August 23, 2007

No. 268074
Macomb Circuit Court
LC No. 2004-003383-CZ

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiffs' appeal from a judgment of the circuit court in favor of defendants on plaintiffs' complaint seeking enforcement of certain deed restrictions. We reverse and remand.

Plaintiffs and defendants are property owners in the Lockwood Hills development in Macomb County. Over the years, a number of the lots have been split, sold to different parties, with two separate houses built on the originally platted lot. Plaintiffs purchased one-half of Lot 81 from a predecessor in title and built a house. Although plaintiffs' vendor had intended to build a house on the other half of that lot, that apparently never happened. Eventually, defendants purchased the other half of Lot 81 and proceeded to build a house.[1] It became apparent to plaintiffs that defendants did not intend to comply with the deed restrictions applicable to most of the lots in Lockwood Hills and plaintiffs filed this action seeking injunctive relief. At the time of the hearing on the request for a preliminary injunction, only the basement of the house had been excavated. The trial court denied the preliminary injunction and

[1] For ease of reference, we shall refer to plaintiffs' parcel as being Lot 81A and defendants' parcel as Lot 81B.

defendants proceeded with the construction. Following a bench trial, the trial court adopted defendants' proposed findings of fact and conclusions of law and denied equitable relief.

At issue are defendants' violations, or alleged violations, of three of the restrictions. Restriction 6 provides as follows:

> Each lot shall be limited to one residence only, excepting that not more than two residences may be erected upon any one lot providing, however, that even such residence shall not be less than 100 feet apart from each other and conform to all other restrictions.

Restriction 10 provides:

> No residence or garage or outbuilding shall be erected or maintained nearer than 50 feet to the front lot line thereof and 40 feet from any side lot line.

And the third restriction, Restriction 13, provides as follows:

> Plans of all buildings to be built upon any lot on said subdivision shall be submitted and approved by subdivider or by Property Owners Association or committee comprised of 3 or 5 property owners on said subdivision to who the subdivider may assign such authority, and no building shall be built without written approval of either the subdivider or Property Owners Association.

Plaintiffs first argue that the trial court erred in finding that Deed Restriction No. 6, which requires that two houses built on the same lot be at least 100 feet apart, was inapplicable because Lot 81 had been split. We agree. The central issue to this case is whether defendants' house had to be built at least 100 feet from plaintiffs' house because both are built on the original lot 81 or whether, because the lot had been split, this restriction does not apply. The trial court concluded that, because the lot had been split, the restriction does not apply.

Deed restrictions are a contract. *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). The interpretation of a contract is a question of law that is reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). In interpreting a deed restriction, the intent of the drafter controls and the provisions are to be strictly construed against the enforcer. *Id.* Equitable relief will not be granted unless the violation is obvious. *Id.* Furthermore, equitable actions are reviewed de novo. *Burkhardt, supra.*

The trial court provides limited reasoning for its conclusion. It states a conclusion that Lot 81 was split into two lots in the 1970s, resulting in two lots, Lot 81A and Lot 81B, and therefore Restriction 6 does not apply. And, in a footnote, it states that such a conclusion is compelled because otherwise the situation would arise in which two houses built on two lots split

from a single original lot would have to be 100 feet apart, while houses built on two adjacent original lots would only have to be 80 feet apart.[2]

Turning to the first point, that lots 81A and 81B are now two separate lots, that does not address the question whether Restriction 6 applies to houses built on the originally platted lots or on lots created by a split. At the time the restrictions were drafted, signed and recorded, the plat was already in existence. That plat established certain lots. Therefore, we concluded that the clear and unambiguous reference to "lot" in the restrictions is to each "lot" as described in the plat. Indeed, the conclusion that Lot 81A and Lot 81B are, in fact, two separate lots is questionable at best. To our knowledge, the plat has never been amended to reflect that these are two separate lots, either before or after the creation of the restrictions. For that matter, defendants' deed does *not* convey "Lot 81B." Rather, it conveys the "West ½ of Lot 81" of the subdivision. See *Webb v Smith (Aft Rem)*, 204 Mich App 564, 571; 516 NW2d 124 (1994) ("the surveys that are part of the record and the clear language of the deeds through which defendants came into possession of this parcel indicate that defendants' parcel was 'one-half' of a lot").

As for the trial court's second point, that construing Restriction 6 as applying to houses built on two lots split from an original would create a different separation requirement than applies to two houses built on two separate original lots, we fail to see why that is a concern. That is, the trial court states a need to harmonize the separation restrictions, but provides no reason why the two restrictions need to be harmonized. It is true that under our interpretation of the deed restrictions, two houses built on the same original lot (which was subsequently split and sold to two different owners) would have to be farther apart than perhaps either is to the neighbors on the other sides because those neighbors are on different original lots. But we simply fail to see why that matters or why that should not be permitted.

Accordingly, we conclude that, despite the conveyance over the years of portions of an originally platted lot, restrictions within the deed restrictions on what may be built on a "lot" refers to the originally platted lots. That is, for purposes of applying the deed restrictions, Lots 81A and 81B must simply treated as a single lot, Lot 81. Therefore, the trial court erred in concluding that Restriction 6 does not apply.

With respect to Restriction 10, there appears to be no dispute that defendants' house was built within 40 feet of the side lot lines. But the trial court found a number of reasons not to enforce this restriction. These reasons also apply as reasons not to enforce Restriction 6 even if it is found to apply.

First, the trial court found that any violation of Restrictions 6 and 10 were mere technical violations and should not be enforced. We disagree. It has been held that a technical violation of a restriction does constitute an equitable exception to the general rule of enforcement of deed restrictions if the technical violation does not result in substantial injury. *Webb v Smith (Aft Sec*

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[2] Restriction 10 requires that a house be built 40 feet from the side lot line. Thus, if house on two adjacent original lots were each built exactly 40 feet from the common side lot line, the two houses would be 80 feet apart.

Rem), 224 Mich App 203, 211; 568 NW2d 378 (1997). Technical violations are slight deviations that do not add to or take from the purposes of the development scheme. *Id.*, citing *Camelot Citizens Ass'n v Stevens*, 329 So 2d 847 (La App, 1976).

We initially note that the viability of the technical violation exception appears questionable in light of the Supreme Court's decision in *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002). In *Terrien*, the Court noted that where the construction of the instrument is clear and the breach is clear, the restriction is enforceable even if the injury is *de minimis*. *Id.* at 65. See also *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 516; 686 NW2d 506 (2004).

In any event, we cannot agree with the trial court that this case presents mere technical violations, especially with respect to Restriction 6. With respect to that restriction, the violation is a 20-foot encroachment into a 100-foot setback requirement. We cannot characterize that as "technical" in either size or percentage. Similarly, the encroachment on the west side lot line is 12.68 feet into a 40-foot setback requirement, or over 30%. Again, we find this to be more than a mere technical violation by both size and percentage. Furthermore, defendants' violations were intentional and enforcement action was taken at the very beginning of construction. This is in contrast to the situation in *Stevens, supra*, where there was ambiguity and confusion regarding the size of the setback requirement and no enforcement action was taken until substantial construction had been completed. *Id.* at 849. Indeed, it would appear from *Terrien* and *Hickory Pointe* that, to the extent that the technical violation doctrine has any continued viability in Michigan, it is to be applied only in situations where the violation is unintentional.

As for the encroachment into the east side lot line setback, the lot line shared by the parties, we conclude that this should not be regarded as an encroachment. Just as we concluded that the originally platted lots are the relevant parcels for application of Restriction 6, so too should the originally platted lots be the relevant parcel for application of Restriction 10. That is, Restriction 10 does not apply to "side lot lines" created by the splitting of an original lot.

In sum, we are not faced with a situation where by innocent mistake a house was built that slightly encroached into the setback zone. Rather, we have a substantial, intentional and flagrant violation of the setback requirement of Restriction 10. Therefore, the trial court erred in refusing to enforce the restrictions on this basis.

Next, the trial court held that the restrictions were unenforceable due to waiver or abandonment of the restrictions due to permitted violations in recent years. We disagree. For restrictions to be deemed waived, the violations of those restrictions must be to such an extent that the original purpose of the restrictions are defeated. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 346; 591 NW2d 216 (1999). Indeed, even a relatively large number of violations do not necessarily establish waiver. *Id.* at 342. The existence of a waiver must be determined on the facts of each case. *Id.* at 344.

The exact nature of the violations is unclear because the trial court relied upon the testimony of defendants' expert, Jeffrey Wright, who testified that he employed the "offset method" and admitted that this method does not depict the actual distance between two houses. Indeed, plaintiffs' expert, Craig Amey, testified that he actually measured the distance between the houses that Wright found a violation of Restriction 6 (based upon the offset method) and

Amey found the separation to be in excess of 100 feet, with apparently one exception.[3] Moreover, Wright testified that in some instances where he was unable to inspect the property, he concluded that there were violations because from "the road there appeared to be something going on as far as a violation." It does appear from the testimony that the setback requirements have historically not been enforced against non-permanent structures. That is, against structures not permanently affixed to a foundation. But we are not dealing with such a structure here.

In any event, we not persuaded that the violations are of sufficient magnitude that it can be concluded that the character of the neighborhood has changed because of the violations to the extent that the original purpose of the restrictions are defeated.

Furthermore, the Supreme Court's recent opinion in *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, ___ Mich ___; ___ NW2d ___ (No. 130990, decided July 18, 2007), suggests that the focus should be on the previous violations occurring on the lot that is the subject of the current enforcement action. *Slip op* at 13-15. And even then, the restrictions are enforceable against violations that are more serious than the previously overlooked violations. *Id.* Indeed, the Court noted that enforcement is not precluded merely because the plaintiff "had not objected to similar violations that occurred several blocks away . . . ." *Id.*, *slip op* at 17, citing *Brideau v Grissom*, 369 Mich 661, 667; 120 NW2d 829 (1963). In the case at bar, the unabated violations upon which the waiver argument is based occurred on other lots, some that were some distance away, and not of the magnitude presented here.

For the above reasons, we conclude that the trial court erred in determining that the existence of violations of the restrictions constituted a waiver of the restrictions to preclude plaintiffs' enforcement of the restrictions against defendants.

The trial court also applied the general principles of equitable estoppel to prevent enforcement of the restrictions. But we are unaware of any binding precedent that applies equitable estoppel to deed restriction enforcement actions.[4] Moreover, the Supreme Court in *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957), only identified three equitable exceptions to the general rule of enforcing deed restrictions: (1) technical violations and the absence of substantial injury, (2) changed conditions and (3) limitations and laches. See also *Webb (Aft Sec Rem), supra* at 211-212. We agree with plaintiffs that the only estoppel-type argument would be an argument based on waiver resulting in changed conditions; i.e., the second exception under *Cooper*. And we already dealt with the issue of waiver above. Indeed, the substance of the estoppel argument is defendants' reliance on the existence of violations of the deed restrictions. But as discussed above, that does not render the restrictions unenforceable and, therefore, defendants could not reasonably rely on those violations as rendering the restrictions unenforceable as a whole. See *Michigan Nat'l Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 23; 566 NW2d 7 (1997).

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[3] And it appears that those two houses were built before the restrictions went into effect.

[4] The trial court only referred to unpublished opinions of this Court.

Next, the trial court concluded that plaintiffs were not entitled to equitable relief because they come to the case with unclean hands. See *Rose v Nat'l Auction Group*, 466 Mich 453, 463; 646 NW2d 455 (2002). The trial court cited (1) plaintiffs' past actions which made it difficult to build a house on Lot 81B and (2) that plaintiffs themselves are in violation of the restrictions.

With respect to the first point, it is not entirely clear from the trial court's findings and conclusions what problem was created, but it appears that the manner in which Lot 81 was originally split in 1972 and a l975 transaction between plaintiffs and the original grantor which transferred a portion of Lot 81B to plaintiffs to even the lot lines, may have caused difficulty in Lot 81B complying with township zoning ordinances if built upon. The trial court further found that plaintiffs opposed the granting of a variance to defendants' predecessor in title. But the trial court also found that plaintiffs' purchase of Lot 81A was in an arm's length transaction and that it was unclear whether plaintiffs were aware at the time of the 1972 and 1975 transactions that it created problems with respect to the buildability of Lot 81B. In fact, the trial court concluded that plaintiffs were aware of the difficulty in developing Lot 81B "at least as early as 1977," or two years *after* the last transfer of property between the two sublots. Given the absence of any evidence to support a conclusion that plaintiffs purposefully engaged in improper conduct to render Lot 81B unbuildable, we see no basis for concluding that plaintiffs have unclean hands merely because their original grantor failed to ensure that the portion of the lot that she retained would remain buildable. Similarly, we see no basis for concluding that a landowner has unclean hands merely because they oppose the granting of a variance by the township.

As for the second point, the trial court found that plaintiffs have unclean hands because they violated Restriction 10 by constructing their pool 25.5 feet from the side lot line in violation of the 40-foot setback requirement. Initially, we note that plaintiffs contest the accuracy of the trial court's finding that the pool is located within 40 feet of the side lot line, maintaining that it is actually just over 40 feet from the lot line. In any event, we need not resolve the question of whether the trial court's factual finding on this point is accurate because we believe it is irrelevant for two reasons.

First, any encroachment by the pool is on the side lot line shared by the parties. As we concluded above, Restriction 10 does not apply to the side lot lines created by the splitting of an original lot. Second, Restriction 10 applies to residences, garages and outbuildings. A pool is obviously neither a residence nor a garage. In reaching this conclusion, the trial court looked to Restriction 7, which prohibits any "trailer, basement, tent, shack, garage, barn or other outbuilding" from being used a residence. From this the trial court reasons that a basement must be an outbuilding. The trial court notes that a basement is a structure with four walls but not covered by a roof. It then notes that a pool has four walls and no roof and differs from a basement only in that the pool is filled with water. Then, for good measure, it notes that an in-ground pool, like a basement, is a permanent structure constructed below ground level.

The Random House Webster's College Dictionary defines "basement" as "a story of a building, partly or wholly underground" and "the portion of a building beneath the principal story" as well as "the lowermost portion of a structure." The dictionary further defines "building" as "any relatively permanent enclosed structure on a plot of land, having a roof and usu. windows." Thus, while a basement may not have a roof, it is the lowermost portion of a structure that does have a roof. Furthermore, there is no indication that plaintiffs' pool is

enclosed. In short, there is no reasonable argument that plaintiffs' pool is a basement and, therefore, is subject to Restriction 10.[5]

For the above reasons, we conclude that plaintiffs are not barred from obtaining equitable relief because of the unclean hands doctrine.

Next, plaintiffs challenge the trial court's conclusion that defendants had not violated Restriction 13 because the homeowners' association had not in recent years established an Improvement Committee as required by the association by-laws. We agree with plaintiffs that the trial court erred in concluding that defendants could not be in violation because there was no Improvement Committee. Restriction 13 does not require that the review be done by the Improvement Committee, but by the association as a whole. Indeed, the only reference to a committee is one appointed by the subdivider and, in any event, the three potential reviewing authorities are listed in the alternative. That is, review can be by any of the three authorities. Therefore, Restriction 13 could be met if the association as a whole reviewed the plans and voted to accept them.[6] But we also note that it is not clear to us that this error has any meaning. That is, it would not seem appropriate to require defendants to tear down their house merely because they did not comply with Restriction 13 if they were otherwise in compliance with the deed restrictions. Rather, it seems to us that Restriction 13 is prophylactic in nature, with the review designed to avoid the problems present in this case by ensuring that all are in agreement that the building plans are in conformance with the deed restrictions. In other words, by proceeding without a review, a property owner does so at their own peril that their plans were in compliance with the deed restrictions. If the resulting house conforms to the restrictions, no harm is done and no remedy is required. But if the house does not conform, then the property owner will, as defendants do in this case, face the potentially expensive prospect of remedying the violation(s).

Finally, plaintiffs challenge the trial court's conclusion that plaintiffs are not entitled to an equitable remedy because they had an adequate remedy at law. But, in actuality, the trial court's conclusions do not make a finding that there is an adequate remedy at law, but merely that the deed restrictions allow for the recovery of money damages and that plaintiffs have not established that money damages would be adequate. But there is no presumption in favor of money damages that plaintiffs had to rebut.

Rather, the burden is on the trial court "for a determination of the appropriate remedy." *Bloomfield Estates, supra, slip op* at 22. Accordingly, the trial court must fashion a remedy

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[5] The trial court also observes in a footnote that the township's zoning ordinance requires that pools comply with the ordinance's setback requirements. That is all well and good but has nothing to do with the case at bar. Restriction 10 could have required swimming pools to comply with its setback requirements, but it does not. If deed restrictions had to mimic the local zoning ordinance, they would serve no purpose.

[6] For that matter, we see no reason why the committee had to be in place before defendants submitted their plans. The submission of plans may have prompted the need to appoint the committee.

consistent with this opinion and consistent with the controlling opinion of *Webb (Aft Sec Rem)*, *supra*.

Reversed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiffs may tax costs.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer